

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL R. BELL,

Defendant-Appellee.

UNPUBLISHED

May 25, 2001

No. 226527

Wayne Circuit Court

LC No. 98-012761

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). At defendant's jury trial, the trial court granted defendant's motion for a mistrial. The prosecution now appeals as of right from an order granting defendant's motion for dismissal, with prejudice, of the charges against him. We reverse.

The prosecution argues on appeal that the trial court erred in dismissing the case on the grounds of double jeopardy after the prosecution mentioned during its opening statement that after the police stopped a stolen car, they talked to the codefendant driver, then found and arrested defendant. We agree. Double jeopardy issues are reviewed de novo. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000). A trial court's determination that the prosecutor "intended to goad the defendant into moving for a mistrial" is subject to appellate review under the clearly erroneous standard. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). In determining the prosecutor's intent, the trial court should make its decision "on the basis of the objective facts and circumstances of the particular case." *Id.* at 257.

"The Michigan and federal constitutions provide that no person shall be put in jeopardy twice for the same offense." *Dawson, supra* at 250. See US Const, Am V; Const 1963, art 1, § 15. The purpose of the double jeopardy prohibition is to protect persons from repeated prosecutions for the same crime. *Dawson, supra* at 250. Double jeopardy principles bar retrial where a defendant's motion for mistrial is prompted by intentional prosecutorial misconduct intended to provoke the defendant into moving for a mistrial. *People v Gaval*, 202 Mich App 51, 53; 507 NW2d 786 (1993), quoting *Dawson, supra* at 253. However, "[w]here a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his

control, the public interest in allowing a retrial outweighs the double jeopardy bar.” *Dawson, supra* at 257.

We conclude that the trial court erred in granting defendant’s motion to dismiss. The prosecutor’s remarks in his opening statement were innocent or at most negligent. After a careful review of the facts and circumstances in this case, the prosecutor’s remarks do not appear to have been intentional misconduct or intended to goad defendant into moving for a mistrial. The prosecutor apparently acknowledged that introduction of the codefendant’s statements was inadmissible hearsay and that he would not use them in his case-in-chief in order to avoid provoking a mistrial. Furthermore, the alleged intentional misconduct occurred during the prosecutor’s opening statement before any evidence was presented. The prosecutor’s remarks were innocent or at most negligent as the prosecutor was merely trying to explain the sequence of events as they happened and was willing to present case law supporting his position. Even if, as the trial court appeared to believe, the prosecutor was trying to circumvent the hearsay rules by implication, we believe that such conduct at most may have been negligent, but it was clearly not intended to provoke a motion for mistrial from the defense. The prosecutor did not relate that codefendant made a statement. The prosecutor did not discuss the content of the statement nor did he allude to inadmissible hearsay.

Finally, the prosecutor appeared extremely surprised and angry by the judge’s decision to grant a mistrial. In fact, he vehemently argued against the mistrial motion. There is simply no evidence on the record to support the trial court’s finding that the prosecutor intended to provoke a mistrial or committed prosecutorial misconduct in his opening statement, and therefore the trial court clearly erred in finding intentional prosecutorial misconduct. Accordingly, the public interest in allowing a retrial outweighs the double jeopardy bar and the trial court erred in dismissing the case on the basis of this erroneous finding. See *Dawson, supra* at 257.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot